No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT R. BRUCE,
General Counsel,

DAVID J. SAYLOR,
Deputy General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOHN E. INGLE,
Counsel.

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

INDEX

CITATIONS

Court decisions:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission respectfully asks this Court to issue a writ of certiorari to review the April 14, 1978, order of the Court of Appeals for the District of Columbia (*Execunet II*) which granted a motion for an order directing compliance with that court's previous mandate in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (*Execunet I*).

OPINIONS BELOW

The order and opinion of the court of appeals (Pet. App. A) and the decision of the FCC (Pet. App. C) are not yet reported.

JURISDICTION

The court of appeals issued its order on April 14, 1978. That court denied timely filed petitions for rehearing and suggestions of rehearing *en banc* by orders dated May 8, 1978 (Pet. App. D). This petition is filed within the time allowed by statute, as enlarged by this Court's order to August 17, 1978. 28 U.S.C. § 2350(a). This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Common carriers have no duty under the Communications Act to connect their facilities with those of other carriers unless and until the FCC, "after opportunity for hearing," finds that connection is "necessary or desirable in the public interest. . . ." 47 U.S.C. § 201(a). In response to a request by the American Telephone and Telegraph Company (AT&T) for clarification of its interconnection obligations, the FCC issued a declaratory ruling that its own orders pursuant to Section 201(a) had not required the established telephone carriers to provide interconnections for use by the specialized carriers in offering ordinary long distance service. (Pet. App. C.) The court of appeals, purporting to enforce its mandate in *Execunet I* (Pet. App. B), which dealt with the scope of specialized carriers' facilities authorizations under Section 214, 47 U.S.C. § 214, required immediate interconnection between the carriers without limitation as to services (Pet. App. A).

The *Execunet II* decision presents these anomalies. First, in ordering interconnection, the court of appeals relied primarily on its earlier interpretation (in *Execunet I*) of a provision (Section 214) which does not have anything to do with interconnection, rather than on an independent evaluation of Section 201(a), which does govern interconnection. Second, although Section 201(a) plainly contemplates that the FCC *knowingly* hold a "hearing" and thereafter make an affirmative "public interest" finding before mandating interconnection, the *Execunet II* court disbelieved or ignored the FCC's protestations that it had never held such a hearing, never made the requisite finding, and never mandated interconnection. Third, on the strength of *Execunet I*, which barely mentioned and certainly never focused upon the subject of interconnection, the *Execunet II* decision overrode another decision (the Third Circuit's) which had directly considered and defined the scope of the FCC's only relevant interconnection orders, in reliance upon and consistent with the FCC's views. Fourth, even though AT&T had been specifically denied an FCC hearing on MTS/WATS interconnection because that issue was beyond the scope of the inquiry, *Execunet II* told AT&T years later that the issue *had* been decided after all and that the carrier reasonably should have known that all along.

The questions for this Court are:

1. Did the court of appeals impermissibly expand its mandate to govern matters which were neither

considered nor decided in its earlier decision but which had been resolved definitively in another circuit in a manner that conflicts directly with the order in *Execunet II*?

2. Did the court of appeals act beyond its authority as a court reviewing agency action when it ordered immediate carrier interconnection?

3. Did the court of appeals erroneously apply the relevant statute in finding that the FCC had required carriers to connect their facilities even though (a) the agency concededly had not provided an opportunity for hearing and had not made the requisite public interest finding and (b) another court of appeals, on direct review of the FCC's interconnection order, had held that those orders did not require this kind of connection?

STATUTES INVOLVED

Sections 201(a) and 214(a) and (c) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 201(a), 214(a) and (c), state, in pertinent part:

> *Section 201(a).* It shall be the duty of every common carrier engaged in interstate and foreign communication by wire or radio * * *, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers * * *.

Section 214(a). No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.

Section 214(c). The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof * * *, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

The court of appeals continues in this case to make and implement important communications policy. In *Execunet I*, the court held that the FCC had inadvertently granted unlimited authorizations to the "specialized" common carriers, with the result that those carriers are free to offer any services they may choose over their own intercity facilities. That decision drastically expanded the FCC's competition policy to include services the FCC had not intended to embrace in its policy. (Pet. App. B.)

In this case, the court of appeals implemented its earlier expansion of the FCC's competition policy by directing the established telephone companies to interconnect their local exchange facilities with the specialized carriers' interstate facilities. (Pet. App. B.) The court of appeals' latest order rested not on error in the FCC's own interconnection decisions, but upon the court's own perception of what is necessary to realize "the intended effect of [its] decree" in *Execunet I*.

The court of appeals in *Execunet II* granted a motion for an order requiring immediate interconnection between local exchange telephone facilities and the intercity facilities of specialized communications common carriers, to enable those carriers to provide ordinary long distance service. (Pet. App. 4A-5A.) Although that court purported merely to direct compliance with its earlier mandate in *Execunet I*,[1] its order in effect (1) performed an important substantive administrative function (requiring carriers to connect their facilities) that Congress has expressly delegated to the FCC; (2) expanded the *Execunet I* mandate to govern matters that the court did not consider or decide in that case; (3) summarily reversed a decision of the FCC that rested entirely upon the agency's construction of its own prior orders, as another court of appeals had construed those

---

[1] *MCI Telecommunications Corp.* v. *FCC*, *supra*, 561 F.2d 365 (Pet. App. B).

orders on direct review;[2] and (4) left the FCC with the dilemma of irreconcilable judicial mandates with respect to the scope of its outstanding interconnection orders.

Execunet II apparently rests upon the court of appeals' assumption that its earlier mandate had resolved all questions regarding long distance telephone competition in favor of the successful litigants in *Execunet I*. (Pet. App. 18A, 5E, 10D.) Thus, the court required interconnection because, as a practical matter, the specialized carriers needed local exchange facilities to provide long distance service—even though the court had not considered the "very different issue" of interconnection in *Execunet I* (Pet. App. 27B n. 59) and even though the holding in that case had been limited expressly to a finding of procedural error in the FCC's certification process (Pet. App. 30B-31B, 32B). In this statement, we describe briefly the *Execunet I* case, the relevant interconnection orders as construed on direct review in another circuit, the FCC's declaratory ruling in this case, and the *Execunet II* decision.

---

[2] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1023, *reh. denied*, 423 U.S. 886 (1975).

A. Execunet I.[3]

Interstate common carriers provide services that may be divided into two broad categories: public telecommunications services, including ordinary long distance message toll telephone service (MTS) and wide area telephone service (WATS); and private line services, also known as leased line services.[4] While MTS and WATS historically have been monopoly offerings, private line services have been competitive to some degree.[5] The Commission in recent years has encouraged and authorized new entry into specialized private line services.[6] It has not consciously introduced competition into MTS and WATS.

---

[3] We describe the *Execunet I* case in some detail because an understanding of that case is essential to informed action on our petition for certiorari. Although the FCC continues to believe that *Execunet I* was incorrectly decided, this Court denied our petition for certiorari in that case. 434 U.S. 1040. Our present petition assumes that *Execunet I* is now binding on the Commission.

[4] President's Task Force on Communications Policy, *Final Report*, Ch. 6, pp. 9-10 (1968); M. Irwin, *The Telecommunications Industry*, pp. 24-25 (1971).

[5] See *Nader* v. *FCC*, 520 F.2d 182, 197 (D.C. Cir. 1975); *American Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 868 (2d Cir. 1973).

[6] *E.g.*, *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See generally, *Customer Interconnection*, 61 FCC 2d 766 (1976) (an appraisal of the economic impact of the FCC's competition policies on the telecommunications industry, including an overview of those policies).

MCI Telecommunications Corp., the petitioner in the court of appeals, is a "specialized common carrier" operating under FCC authorizations. MCI filed a tariff in 1974 to broaden its service offerings by providing a "metered use service" as an additional option to its full-time and part-time private line services.[7] Although the tariff did not mention Execunet by name or describe the service, MCI began to offer Execunet pursuant to the tariff early in 1975.

Several months later, AT&T complained to the FCC that Execunet was outside the scope of MCI's authorizations. AT&T alleged that Execunet was not a private line service at all, but was functionally the same as MTS or WATS.[8] (Pet. App. 4B.) The

---

[7] A private line service is what the name implies: a service in which the customer buys the privilege of using facilities that are dedicated in some meaningful respect to his or her personal use, always available to the customer, directly connecting the customer's premises with another point (or a number of other points) selected in advance, capable of instant connection without the need for dialing, and tariffed at a periodic rate rather than according to use. See *MCI Telecommunications Corp. (Execunet)*, 60 FCC 2d 25, 40-44 (1976). A private line service need not have all these characteristics. *Private Line Cases*, 34 FCC 244, 249-51 (1961), 34 FCC 217 (1963), *aff'd sub nom. Wilson & Co.* v. *FCC*, 335 F.2d 788, 792 (7th Cir. 1964), *remanded for consent settlement*, 382 U.S. 454 (1966).

[8] An Execunet customer may place calls from any telephone in the Execunet network to any telephone in a distant city in the network by dialing a local MCI number, a customer access code, and the telephone number in the distant city. The customer pays a toll for each call that is based on time and distance, subject to a minimum monthly charge. (Pet. App. 5A n.2, 3B & n.3.)

Commission had consistently asserted that it had authorized competition by specialized carriers such as MCI only in private line services, and that those carriers had no authority to provide MTS or WATS.[9]

After obtaining comments from interested parties and hearing oral argument, the FCC concluded that Execunet was not a private line service, but that it had all the essential characteristics of MTS or WATS. Concluding that MCI had no authority to offer such a service under its existing certificates, the Commission directed MCI to cease and desist from offering Execunet.[10]

On judicial review, the court of appeals reversed, in *Execunet I.* (Pet. App. B.) After outlining its view of the statutory scheme for regulating common

---

[9] See *American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *Washington Util. & Transp. Comm., supra*, 513 F.2d 1142; *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250. *Cf. Microwave Communications, Inc.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Penn. 1973), *vacated* (on primary jurisdiction grounds), 496 F.2d 214 (3d Cir. 1974). The FCC had confined its specialized carrier proceeding to private line services as a matter of administrative efficiency, both because the applicants had proposed only that kind of service and because the public policy questions involved in MTS/WATS competition would be much more complex and apparently did not need to be resolved in that proceeding.

[10] *MCI Telecommunications Corp.*, 60 FCC 2d 25. The question for the FCC in that proceeding was whether MCI's existing certificates were broad enough to permit the offering of Execunet—not whether the FCC should open further markets (including the MTS and WATS markets) to competition. *Id.* at 35.

carriers under Title II of the Communications Act, that court stated:

> Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

(Pet. App. 21B.) The court of appeals decided, on the basis of statutory analysis, that the FCC did have authority to restrict the services a carrier may offer; but it found that the FCC may do so only if it has "affirmatively determined" that the public convenience and necessity require such restrictions. (Pet. App. 24B-26B.)

Turning to the second question—whether the FCC had properly exercised its authority to restrict MCI's authorizations to particular services—the court of appeals analyzed the *Specialized Common Carrier Services* rulemaking proceeding, and concluded that the Commission had not made the requisite statutory findings to restrict specialized carriers to private line services. (Pet. App. 26B-31B.) Accordingly, it held that MCI's facility authorizations were not restricted and that the Commission had erred in requiring MCI to cease and desist from offering Execunet on grounds that it was an unauthorized service. *Id.*

That court made no findings beyond its holding that the FCC had not properly restricted MCI's authorizations and therefore could not require MCI to terminate a particular service on grounds that it was unauthorized. In fact, the court of appeals expressly denied any broader holding:

> We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings.

(Pet. App. 32B.) There was no mention of interconnection rights or obligations, because none of the parties had raised these questions either before the Commission or in the court of appeals.[11]

---

[11] The court of appeals also did not disturb the FCC's finding that Execunet was the functional equivalent of MTS or WATS, although MCI had challenged that finding on review. (Pet. App. 36C.)

When the FCC and others petitioned this Court for certiorari,[12] MCI and another specialized carrier, Southern Pacific Communications Co., argued that the Court should deny the petitions because, *inter alia*, (1) the court of appeals had merely remanded the matter to the FCC for its further consideration, (2) the *Execunet* decision was narrowly limited to a finding of procedural inadequacy in the certification process and did not require the FCC to take any particular action with regard to its competition policies, and (3) in this posture, the case was not ripe for review by this Court.[13] The Court denied the petitions for certiorari,[14] although, of course, we have no way of knowing whether these arguments by MCI and Southern Pacific influenced its decision.

Shortly after denial of certiorari, the FCC undertook to set its competition policies in order, in light of both its statutory mandate and the *Execunet I* mandate. First, it initiated an inquiry into the MTS and WATS market structure, with a view to determining whether competition in those areas would serve the public interest.[15] Second, the Commission

---

[12] The United States Independent Telephone Ass'n (USITA) and AT&T filed petitions in addition to the FCC's petition. Nos. 77-420, 77-421 and 77-436.

[13] MCI's Brief for the Respondents in Opposition, pp. 35-40; Brief for the Respondent Southern Pacific Communications Co. in Opposition, pp. 10-14.

[14] 434 U.S. 1040 (Justices Stewart and Powell stating that they would have granted the writ).

[15] *In the Matter of MTS and WATS Market Structure,* FCC 78-144, released February 28, 1978. The *Execunet I* opinion

acted on a petition by AT&T for clarification of that company's interconnection obligations to MCI and other specialized carriers. The FCC's declaratory ruling in response to AT&T's petition, interpreting the agency's own previous orders as not requiring interconnection for MTS and WATS services, was the genesis of *Execunet II*. (Pet. App. C.)

B. The Declaratory Ruling.

AT&T's petition asked the FCC to issue a declaratory ruling with regard to its outstanding interconnection orders so as to make clear that the telephone company had no obligation to provide additional interconnections to MCI for Execunet and other non-private line services.[16] The Commission considered the petition in light of comments and arguments of interested parties and in full awareness

---

had stated that the court of appeals had not considered "whether competition like that posed by Execunet is in the public interest," and had said that was "the question for the Commission to decide should it elect to continue these proceedings." (Pet. App. 32B.) In fact, the Commission had no "election" in the matter. It had a statutory responsibility to resolve this important policy question, as well as a duty to act on specific applications and requests for rulings, such as AT&T's request for clarification of its interconnection obligations. (Pet. App. 43C.)

[16] AT&T asked the FCC broadly to declare that there was no interconnection obligation under the antitrust laws, the common law, or any other federal or state statute in addition to the Communications Act. The Commission expressly denied the petition insofar as it requested a determination of AT&T's obligations arising apart from the Communications Act. (Pet. App. 52C, 11A n.14.)

of the *Execunet I* mandate. But its decision necessarily rested upon an interpretation of its own previous interconnection orders, as those orders had been construed on direct review.

1. *Relevant interconnection orders.* Although common carriers have no duty under the Communications Act to connect their facilities with those of other carriers,[17] the Commission may require interconnection, after opportunity for hearing, on the basis of a public interest finding. 47 U.S.C. § 201(a). Rights and obligations to interconnection do not arise from certification of facilities; rather, interconnection and certification are discrete regulatory functions governed by independent statutes and different policy objectives and concerns.[18]

In its *Specialized Common Carrier Services* proceeding, the Commission established an open entry policy under Section 214(a) for new carriers who had proposed to offer specialized communications services. At the same time, the Commission addressed the Section 201(a) problem of providing local distri-

---

[17] *Bell Tel. Co. of Penn., supra,* 503 F.2d at 1270. See *Atchison, T. & S.F. R.R.* v. *Denver & N.O. R.R.,* 110 U.S. 667, 680 (1884); *Western Union Telegraph Co.,* 17 FCC 152, 171 (1952), 17 FCC 503 (1953).

[18] The Commission may grant a certificate of convenience and necessity authorizing new facilities, pursuant to Section 214(a), without requiring interconnection, pursuant to Section 201(a). See *Western Union Telegraph Co., supra,* 17 FCC 503 (FCC denied request of Western Union for connection with AT&T for purposes of providing video transmission service over facilities the Commission had authorized).

bution facilities for the new carriers, and declared that "established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers . . . ." *Specialized Common Carrier Services*, 29 FCC 2d at 940. The interconnection question, like the question of Section 214 authorizations, was considered on the assumption that the only authorizations and interconnection rights at stake were those essential to the provision of specialized services.

Two years later, MCI complained to the Commission that AT&T had refused to interconnect with MCI for the provision of two services ("FX" and "CCSA")[19] which AT&T offered to the public as private line services. After a show cause proceeding in which all interested parties filed comments and argued before the Commission *en banc*, the Commission concluded that its *Specialized Common Carrier Services* decision had required interconnection for all private line services, including FX and CCSA.[20] The

---

[19] For a description of these two private line services, see *Bell System Tariff Offerings*, 46 FCC 2d 413, 418 n.5 (1974), quoted at *Bell Tel. Co. of Penn., supra*, 503 F.2d at 1254 n.4.

[20] In oral argument before the FCC, Mr. Laurence E. Harris, MCI's vice president, stated that one reason for assuming that the Commission had ordered FX and CCSA interconnection was that "the staff specifically singled out and excluded from consideration MTS and WATS services. Had it contemplated that FX and CCSA or any other services were not included [in the interconnection obligation], it would clearly have made specific reference to them at this point." FCC

Commission ordered AT&T to provide the interconnection MCI had asked for those two services. *Bell System Tariff Offerings*, 46 FCC 2d 413.

On judicial review, the Third Circuit affirmed. *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250. In the process, that court had to resolve an argument that the interconnection requirement was overbroad. The Third Circuit agreed that the requirement, if it were read in a vacuum, "is somewhat vague and, to a certain extent, overbroad." But it found no necessity to remand on this ground, because it read the interconnection requirement in the context of the *Specialized Common Carrier Services* proceeding. Given this context, the court found that the FCC's order took on a definite meaning:

> As we read the order, the FCC has required AT&T to provide to the specialized carriers those (interconnection) elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department.

503 F.2d at 1273-74. It affirmed the interconnection order, thus construed.[21]

Docket No. 19896, Tr. pp. 77, 78 (March 4, 1974). See also *MCI Communications Corp.* v. *AT&T*, *supra* n.9, 369 F. Supp. at 1027 ("The Commission did mention wide area telephone service (WATS) and long-distance toll service, but only to exclude them from the scope of the decision. If FX, CCSA, and interexchange were to have been excluded also, they would have been singled out as were WATS and private long-distance toll calls.")

[21] The Third Circuit also found that AT&T had not been deprived of its hearing rights under Section 201(a) because

The Commission has issued no other interconnection orders either constricting or expanding the rights of the specialized carriers and the obligations of the established carriers.

2. *The Clarification Order.* At an open meeting on February 23, 1978, in which interconnection, service competition and the *Execunet I* decision were discussed at length, the FCC adopted its declaratory ruling.[22] The ruling rested on the Commission's construction of its own interconnection orders, as affirmed and construed by the Third Circuit, in the light of *Execunet I.* (Pet. App. C.) The Commission concluded that it had provided no opportunity for hearing on MTS and WATS interconnection and had not made the statutory public interest finding that was required for a Section 201(a) order to interconnect. Thus, the Commission declared that AT&T had no obligation under outstanding FCC orders to provide additional interconnection for Execunet or other services that are substantially equivalent to MTS or WATS. *Id.*

The FCC stated that its interconnection ruling was "entirely consistent" with *Execunet I.* (Pet. App.

---

it had "notice of the Commission's intentions" as to interconnection and could claim "neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission." 503 F.2d at 1268.

[22] In its brief in *Bell Tel. Co. of Penn., supra,* the FCC had told the Third Circuit that if any serious questions arose as to the extent of AT&T's interconnection obligations to the specialized carriers, "AT&T can seek guidance from the Commission." (Pet. App. 43C.)

41C.) The error the court had found in that case was the FCC's failure to make an affirmative public interest finding which the court regarded as a prerequisite to imposing service restrictions on certificates. The court had reasoned that "failure to consider" the matter was not the same thing as making "an affirmative determination" that the public interest required restrictions, the Commission stated. (Pet. App. 41C, referring to the court's reasoning at Pet. App. 27B-28B.)

The FCC said that Section 201(a) also required an affirmative finding as a prerequisite to an interconnection order. Since the Commission had expressly excluded MTS and WATS from consideration in the *Specialized Common Carrier Services* proceeding, it had made no affirmative determination that interconnection for such services would serve the public interest. (Pet. App. 41C-42C.) Thus, the Commission concluded, its prior orders as construed in *Execunet I* could not have required such interconnection. *Id.*

MCI immediately petitioned the D.C. Circuit for review of the declaratory order.[23] At the same time, it filed a motion with the court, in the *Execunet I* docket, asking for an order directing the FCC to comply with the court's mandate by requiring AT&T to furnish additional interconnection facilities for Execunet.

---

[23] *MCI Telecommunications Corp.* v. *FCC*, No. 78-1150, D.C. Circuit. This case remains on the docket in the D.C. Circuit.

C. Execunet II.

The Commission had no opportunity to defend its declaratory ruling on the merits, as it would on direct review. Instead, the Commission addressed itself to the motion to direct compliance with mandate.[24] It argued that *Execunet I* did not and could not require interconnection because neither the parties nor the court had addressed that matter in the earlier case. In any event, the Commission argued, the Third Circuit had resolved the interconnection question on direct review in precisely the same way as the declaratory ruling, and the mandate of the Third Circuit controls the question—not the mandate of the D.C. Circuit in *Execunet I*. The Commission urged the court of appeals to deny the motion and to consider interconnection in the separate review proceeding that MCI had initiated, in which the FCC would have a full opportunity for briefing and oral argument.

The court of appeals issued its *Execunet II* order on April 14, 1978. Conceding that *Execunet I* was "not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnection" (Pet. App. 13A), the court concluded that the "thrust" of its opinion and "the expansive interpretation of *Specialized Carrier*" it had advanced "clearly mandate[d] an equally expansive view of the scope of the interconnection obligations" (Pet. App. 16A,

---

[24] The FCC released its order on February 28. FCC litigation counsel responded to the motion to direct compliance on April 6. There was no opportunity for oral argument.

17A). Denial of further Execunet interconnections, that court said, "deliberately frustrates the purpose of the litigation" (Pet. App. 18A), and gives MCI "good cause to feel that [the FCC order] is strikingly unfair" (Pet. App. 12A).

The court of appeals rejected the argument that the Third Circuit's decision controlled the interconnection matter:

> [J]ust as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to those services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references.

(Pet. App. 21A.) The D.C. Circuit did not address the Commission's observation in the ruling that Section 201(a) requires an affirmative public interest finding as a prerequisite to an order for MTS and WATS interconnection and that the FCC had made no such finding.

The court of appeals denied rehearing and rehearing *en banc* on May 8, 1978, with Judges Leventhal and McGowan not participating. (Pet. App. D.)[25]

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because (1) the order in *Execunet II* conflicts directly with a decision

---

[25] This Court, on May 22, denied the applications of AT&T and USITA for stay pending certiorari.

of the Third Circuit and thus confronts the Commission with irreconcilable judicial interpretations of its interconnection orders; (2) the court of appeals has expanded its *Execunet I* mandate to govern matters the court did not consider or decide in the earlier case; (3) the court of appeals has performed an administrative function in establishing important communications policy and ordering interconnection to implement its policy, in derogation of the Commission's statutory function and in violation of the proper role of courts reviewing agency action; and (4) the court's decision is wrong as a matter of statutory interpretation and construction of the relevant agency decisions.

1. Conflict with the Third Circuit.

The Third Circuit's decision in *Bell Tel. Co. of Penn., supra*, 503 F.2d 1250, affirmed the FCC's only relevant interconnection orders and construed them as requiring AT&T to interconnect with the specialized carriers only for the full range of private line services. The Third Circuit directly addressed the scope of interconnection under those orders, because that was what its case was about. It found, after analysis of the FCC's *Specialized Common Carrier Services* policy decision and the interconnection enforcement order in *Bell System Tariff Offerings*,[26] that the FCC had required only "those (interconnection) elements of private line service which AT&T

---

[26] 46 FCC 2d 413 (1974). The Third Circuit reviewed the interconnection enforcement order in *Bell Tel. Co. of Penn.*

supplies to its affiliates. . . ." 503 F.2d at 1273-74. The court also found that AT&T had the required "opportunity for hearing" because it was given "notice of the Commission's intentions" and thus could claim "neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission. . . ." *Id.* at 1268.

To resolve AT&T's inadequate notice and overbreadth arguments, the Third Circuit had to determine whether and where the Commission had drawn a line between services for which interconnection had been ordered and services for which interconnection had not been ordered. By contrast, the D.C. Circuit held that the Commission had not drawn such a line and, indeed, that further proceedings were necessary before the Commission could lawfully forbid interconnection for any category of services. A close analysis of the process of reasoning by which the Third Circuit reached its holdings on notice and breadth reveals the irreconcilable conflict with the rationale and decision in *Execunet II*.

In determining that AT&T had adequate notice in the *Specialized Common Carrier Services* proceeding, the Third Circuit relied heavily on the notice's distinction between "message toll telephone and wide area telephone service" on the one hand and "private line program transmission and other more specialized services" on the other hand. 503 F.2d at 1269. Quoting the rulemaking notice, the court concluded that the Commission had contemplated that, at most, only "2-4 percent" of AT&T's total business would be

"vulnerable to competition" if interconnection were ordered. *Id.* In reasoning that the Commission's reference to "percentages" and its "analysis" of competitive vulnerability gave adequate notice that FX and CCSA were candidates for forced interconnection, the Third Circuit explicitly decided, first, that the "2-4 percent" excluded MTS/WATS and, second, that FX and CCSA were "perforce include[d]" on the basis of "[s]imple mathematics." *Id.* Thus, the *ex*clusion of MTS/WATS was a logical prerequisite to the court's *in*clusion of FX and CCSA, and was not mere dictum or a negative inference unnecessary to the result.[27]

The exclusion of MTS/WATS was also an essential ingredient of the Third Circuit's affirmance of the breadth of the interconnection order. AT&T had charged that the order was "unbounded." Agreeing that the order on its face provided insufficient guidance, the court limited the order to "private line" services in accordance with what it viewed as the intended "context" of the Commission's decision. 503 F.2d at 1273. The court indicated that, absent this limitation, remand would have been necessary.[28] *Id.*

---

[27] See also *MCI Communications, Inc.* v. *AT&T, supra,* 369 F. Supp. at 1015, 1027.

[28] If thereafter the Commission had ruled that its previous order did compel interconnection with MCI for Execunet and other MTS- and WATS-like services, AT&T could have gone promptly to the Third Circuit and obtained summary reversal. AT&T's argument would have been bolstered by the fact that in obtaining the Third Circuit's initial ruling, the Commission, MCI, and others had represented that the interconnection

The D.C. Circuit ruling stands in stark contrast to the foregoing. Whereas the Third Circuit effectively decided that the adequacy of notice and the breadth of the interconnection obligation hinged on the exclusion of MTS/WATS, the D.C. Circuit held that interconnection for MTS/WATS-type services was obligatory. The D.C. Circuit stated that its expansive interpretation of MCI's authorizations "mandates an equally expansive view of the interconnection obligation. . . ." (Pet. App. 17A.) Since that court had earlier held that MCI's authorizations were not restricted in any way (Pet. App. 31B), it follows from the *Execunet II* order that the interconnection obligation is similarly unbounded. This is precisely the construction that the Third Circuit rejected in affirming the Commission's order as having a "definite meaning." 503 F.2d at 1273.

Thus, we have two appellate courts interpreting the same agency orders in flatly inconsistent and irreconcilable ways—the one court agreeing with the agency which issued the order and the other (the D.C. Circuit) deriving a contrary meaning not from the face or context of the order but from the court's earlier opinion (*Execunet I*) on a "very different issue" (Section 214 facilities authorization). (Pet. App. 27B n.59.) Moreover, each court was governed by a dif-

---

obligation extended to private line services and no farther. (Pet. App. 32C-33C, 37C.) The Third Circuit's repeated references to "private line" or "specialized" services (503 F.2d at 1254, 1256, 1259, 1260, 1261, 1273) amply testify to the court's reliance on the parties' representations.

ferent understanding of Section 201(a). The Third Circuit viewed an FCC hearing and "public interest" finding as "condition[s] precedent" to imposition of any interconnection order. 503 F.2d at 1270. Conceding that the FCC had not yet made that "public interest" finding (Pet. App. 8B), the D.C. Circuit necessarily viewed Section 201(a) differently.

The conflict between the circuits will have continuing adverse consequences. Not only will the Commission face the continued dilemma of whether to obey the one circuit or the other, but affected parties appealing future Commission decisions may expand the controversy to other circuits.[29] To ensure a rational and consistent nationwide communications policy in this vital area, the Court should grant certiorari and resolve the conflict between the circuits.[30]

---

[29] For instance, if MCI or another specialized carrier files tariffs which presuppose interconnection with non-Bell operating companies for MTS/WATS-like services, the Commission will have to determine whether such interconnection was required by the 1971 *Specialized Common Carrier Services* decision. If the Commission, relying upon *Execunet II*, rules that interconnection was so required, the affected telephone companies may well seek reversal in the Third or another circuit.

[30] The conflict with *Bell Tel. Co. of Penn.* is clearer and more direct in this case than in *Execunet I*. In *Execunet I*, the D.C. Circuit had not purported to construe the interconnection orders at stake in *Bell Tel. Co. of Penn.* By contrast, in *Execunet II*, the D.C. Circuit construed the very same orders previously and differently construed by the Third Circuit. Moreover, the conflict between the circuit's views of Section 201(a) became manifest only when the D.C. Circuit explictly dealt with interconnection.

2. Expansion of the Execunet I Mandate.

The court of appeals summarily required interconnection in an order purporting merely to enforce its previous mandate. But the earlier decision had resolved only two issues:

> whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

(Pet. App. 21B.) It answered the first in the affirmative; but it reversed the Commission on the sole ground that the agency had not "properly exercised" its authority under Section 214(c) to restrict MCI's certificates because it had not made the requisite public interest finding. (Pet. App. 22B-31B.)

The court did not decide anything about interconnection in *Execunet I*.[31] The issue was not raised either at the agency or in the review proceeding.[32]

---

[31] The *Execunet I* opinion mentioned interconnection only in a footnote attempting to distinguish the *Bell Tel. Co. of Penn.* decision as involving "a very different issue" from the *Execunet I* case—namely, the scope of AT&T's interconnection obligation. (Pet. App. 27B n.59.)

[32] The court of appeals appears in *Execunet II* to suggest some kind of estoppel because the FCC did not rely upon the interconnection issue in its 1976 cease and desist order. (Pet. App. 12A-13A.) But there was no reason for the FCC to address that issue. As the court of appeals apparently concedes, the FCC firmly believed that MCI had limited authorizations, and that the pertinent inquiry was whether Execunet

Indeed, the court went out of its way to deny that its holding was broad. It disclaimed any finding that the public interest required Execunet, it left such questions to further proceedings at the FCC, and it stated its holding narrowly as limited to a procedural failure on the part of the FCC. (Pet. App. 31B, 32B.)[33]

Now the court of appeals appears to say that *Execunet I* mandates interconnection that is coextensive with MCI's unrestricted certificates. The court apparently assumes that its decision required the removal of any and all obstacles to MCI's implementation of Execunet service, without regard to what the Commission might have ordered and, if necessary to achieve that end, without regard to the statutory prerequisites to an interconnection order. 47 U.S.C. § 201(a).[34]

But the reviewing court does not dictate a result; nor does it sit to vindicate expectations or the ulti-

---

was beyond the limit. When the FCC found in the original decision that Execunet was not an authorized service, in its view of the specialized carrier policy, its inquiry was at an end.

[33] The court's characterization of its own opinion supported the oppositions to the petitions for certiorari, which argued that the decision was so narrow and unassuming as not to warrant Supreme Court review.

[34] In a *per curiam* memorandum attached to an order staying its *Execunet II* decision, the court reveals the sweeping view it now takes of *Execunet I*. The court states, in effect, that the Commission may not take any action, pending "final rules" after agency rulemaking, that would be inconsistent with what the court has established as "MCI's right to enter the market now." (Pet. App. 10E.)

mate purposes of litigants. Its function ends when "an error of law is laid bare." At that point, "the matter once more goes to the agency for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952). *Execunet I* properly controls only those matters the court considered and decided directly. See *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The words of the opinion, and not the private thoughts of the judges, constitute the mandate.[35] The words and the reasoning of *Execunet I* do not require or justify the court of appeals' interconnection order.

This Court should grant the writ, in exercise of its supervisory power over inferior courts, to construe the *Execunet I* mandate in the accepted and usual course of judicial proceedings, on the basis of matters actually considered and decided. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 379; *National Labor Rel. Bd.* v. *Donnelly Co.*, 330 U.S. 219, 227; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

3. Judicial Intrusion into Administrative Process.

In addition to ignoring the controlling decision of the Third Circuit and improperly expanding its own mandate, the court of appeals intruded into the

---

[35] Litigants may not be left to speculate as to the requirements of the mandate. See *National Labor Relations Board* v. *Donnelly Co.*, 330 U.S. 219, 229 (1947).

FCC's decision-making process by directly ordering carrier interconnection to implement judge-made communications policy. As the Third Circuit said in *Bell Tel. Co. of Penn.*:

> Section 201(a) of the Communications Act requires (as a condition precedent to the issuance of interconnection orders) that the FCC make a finding that the proposed interconnection will be "necessary or desirable in the public interest."

503 F.2d at 1270. Although the FCC plainly has had no hearing on MTS/WATS interconnection and has made no finding that such interconnection is "necessary or desirable in the public interest," *Execunet II* required immediate interconnection. The court of appeals has no authority either to disregard the statutory requirements or to assume the Commission's function.

Congress gave the FCC the responsibility to make and implement communications policy. That includes the big decisions, such as *Specialized Common Carrier Services, supra,* 29 FCC 2d 870, and the smaller ones that carry out policy in a consistent and rational manner. All its decisions are subject to judicial review; and if error is found, the FCC must take corrective action. But the decisions must be the FCC's. When the court of appeals ordered interconnection, it "overstepped the bounds of its reviewing authority," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), and "usurped an administrative function,"

Federal Power Commission v. *Idaho Power Co.*, *supra*, 344 U.S. at 20.

The order to interconnect underscores a more fundamental problem in this case: the court of appeals has made important communications policy and will not countenance any action by the FCC—even lawful and reasonable action—that might frustrate the "intended effect of [the court's] decree." (Pet. App. 18A.)[36] But as we pointed out above, the function of the reviewing court ends when agency error is "laid bare." At that point, the Commission once again must enforce "the legislative policy committed to its charge." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145. The court of appeals, in rejecting the FCC's interconnection ruling, appears to claim, in effect, that "the Commission lacks power to enforce the standards of the Act in this proceeding." See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203-04 (1947). Such a claim "deserves rejection." *Id.*[37]

---

[36] It seems fair to characterize the court's current view of *Execunet I* as a judicial rulemaking proceeding in which the FCC was permitted to participate and which established, as a matter of policy, "MCI's right to enter the market now." (Pet. App. 10E.) As this Court has pointed out, it is all too easy for a reviewing court to judge agency action "in the light of policies the court, rather than the agency, seeks to implement. . . ." *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973). But this approach to judicial review improperly interferes with Congress' assignment of particular functions to agencies. *Id.*

[37] *Execunet II* also violates the *Chenery* principle that agencies may act either by general rule or by individual order. 332

The court of appeals' interconnection order was an exercise of an administrative function, plainly in violation of consistent rulings in this Court. The Court should grant the writ to restore the appellate review process to its proper bounds.

4. Error in Statutory Construction.

The FCC properly determined in the declaratory ruling that it had not made a public interest finding to justify an interconnection order for MTS/WATS-type services. (Pet. App. 36C-43C.) The court of appeals also eschewed any finding that MTS/WATS competition is in the public interest. (Pet. App. 32B.) Yet, *Execunet II* required interconnection in the face of a statute that expressly forbids such an order in the absence of an affirmative public interest finding. 47 U.S.C. § 201(a). Because no one has made that finding, the court's order rests upon an error in statutory construction.

U.S. at 199-204. The court stated, apparently as an independent ground for its order, that "tariff and rulemaking proceedings" were the "exclusive means" by which the FCC could affect the services provided by specialized carriers. (Pet. App. 16A, 17A, 4E.) But the agency "must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective." 332 U.S. at 203. The Commission surely cannot be faulted for acting on AT&T's petition for a declaratory interpretation of its own outstanding orders, simply because the court of appeals contemplated rulemaking as the "exclusive means" for further agency action in this area. Nor, for that matter, could the FCC ignore its statutory duties under Section 201(a) even though *Execunet I* had overlooked that provision.

The court apparently believed that the logic behind its *Execunet I* interpretation of Section 214 also controlled the interpretation of Section 201(a). A comparison of the two provisions, however, leads to a contrary conclusion. Section 214(c) says that the FCC "*may* attach to issuance of the [214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (emphasis added). In contrast to this permissive language which helped form *Execunet I*'s view that such conditions are the exception and not the rule (Pet. App. 9A n.10), Section 201(a) makes it clear that the FCC *must* provide an "opportunity for hearing" and make a "public interest" finding before ordering interconnection.

The essentional rationale of *Execunet I* was that, under Section 214, once facilities are authorized, a carrier may offer any services with those facilities unless the FCC imposes an express service-limiting condition on the authorization. It does not follow, however, that interconnection orders under Section 201(a) are similarly unbounded.[38] It is one thing to au-

---

[38] Our argument here is independent of the argument that the Third Circuit definitively construed the scope of the interconnection order in *Bell Tel. Co. of Penn., supra,* 503 F.2d 1250. We point out, however, that both statutory and decisional law indicates that the Third Circuit jurisdiction became exclusive when the petition for review of the interconnection orders was filed there, and that the decision of that court precluded any "collateral attack" on its judgment in new litigation between the same parties. 28 U.S.C. § 2349; *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 339-40 (1958).

thorize a carrier to construct and use its *own* facilities in whatever way it may wish. But, as the "opportunity for hearing"/"public interest" finding scheme of Section 201(a) attests, it is quite a different thing to require access to and use of another company's facilities for any possible service. In recognition of the infringement on the business affairs of a separate company, Section 201(a) permits the FCC to require interconnection only to the extent "such action [is] necessary or desirable in the public interest." [39]

In *Execunet I*, the court reversed the FCC because the agency had failed, in the court's view, to make an "affirmative determination" of public interest need for restrictions on MCI's authorizations. (Pet. App. 24B-31B.) The court stated:

> We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that *failure to consider the public interest ramifications* of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and

---

[39] *Execunet II* makes much of the fact that AT&T did provide interconnections during the pendency of *Execunet I*. A carrier's previous voluntary interconnection arrangement might be a proper consideration for the FCC to weigh in determining whether compulsory interconnection thereafter is "necessary or desirable in the public interest." But such prior practice is hardly justification for a court to usurp the FCC's function of balancing that consideration against other competing public interest factors.

> necessity may require" a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

(Pet. App. 27B-28B. Emphasis added.)

But if a "failure to consider the public interest ramifications" could not satisfy a statutory requirement of affirmative public interest findings in Section 214(c), it follows that the same "failure" would not satisfy the requirement of public interest findings that are a prerequisite to an order to interconnect in Section 201(a). We submit that the court's approaches to the requirements of public interest findings in these two statutes are irreconcilable.[40]

The Commission's declaratory ruling, moreover, proceeded from a construction of the agency's own interconnection orders, as those orders had been interpreted on direct judicial review and as the FCC had consistently read and applied them. The agency's reading of its own Act and particularly of its own decisions is entitled to deference in the courts, and must be given controlling weight unless it is plainly erroneous. *Red Lion Broadcasting Co.* v. *FCC*, 395

---

[40] The FCC argued in *Execunet I*, of course, that it could impose service restrictions on certificates without an affirmative public interest finding by virtue of the statute's provision for granting "such certificate as applied for." That position is entirely consistent with our argument that Section 201(a), which contains no such alternative route to ordering interconnection, requires an affirmative public interest finding that the FCC has not made as to interconnection for MTS/WATS-type services.

U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965). In this case, the court of appeals treated the agency's construction almost with contempt: "[The Commission's declaratory ruling] reflected *only* the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*." (Pet. App. 10E. Emphasis added.) Under the proper test, if the FCC's interpretations of the statutory provisions and its own earlier decisions are reasonable—as they plainly are—this Court "must reverse the decision of the Court of Appeals." *Udall* v. *Tallman*, *supra*, 380 U.S. at 18. The court of appeals may not override agency action "simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Def. Coun., Inc.*, No. 76-419 (decided April 3, 1978), slip opinion p. 36.

CONCLUSION

The Court should grant the writ and review the *Execunet II* order.

Respectfully submitted,

ROBERT R. BRUCE,
General Counsel,

DAVID J. SAYLOR,
Deputy General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOHN E. INGLE,
Counsel.

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

August, 17, 1978

U.S. GOVERNMENT PRINTING OFFICE: 1978 271620 100